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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BEVERLY HEALTH AND REHABILITATION SERVICES, INC.,

Petitioner,

v.

FREDERICK L. FEINSTEIN, GENERAL COUNSEL,
NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Do United States District Courts have jurisdiction under 28 U.S.C. §§1331 and 1337(a) to enforce written voluntary agreements containing preconditions to enforcement that Federal administrative agencies enter with a member of the regulated community?

2. Can Federal administrative agencies nullify written agreements they enter which contain preconditions to enforcement by requiring that parties to such agreements assert defenses based upon the agreement only in administrative proceedings before the agency which are only later subject to court review?

CORPORATE DISCLOSURE

Beverly Health and Rehabilitation Services, Inc., and Beverly Enterprises are subsidiaries or affiliates of Beverly Enterprises and all are publicly held companies.

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INTRODUCTION

Beverly Health and Rehabilitation Services, Inc., hereby petitions this Court to issue a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit to review that court's decision and judgment in *Beverly Health and Rehabilitation Services, Inc. v. Frederick L. Feinstein, General Counsel, National Labor Relations Board*, 103 F.3d 151, reprinted in the Appendix hereto ("App.") at 1a.

OPINIONS BELOW

The subsequent order of the Court of Appeals, denying the Petitioner's Motion for Rehearing and Suggestion for Rehearing *En Banc* is unreported and is reprinted in App. 32a.

The prior order of the Court of Appeals denying Petitioner's Emergency Motion for Stay of Mandate Pending Appeal and for Stay of Administrative Proceeding is unreported and is reprinted in App. 13a.

The Order and Memorandum Opinion of the District Court dismissing Petitioner's Complaint is reported at 152 LRRM 2868 and is reprinted in App. 16a.

The subsequent Order of the District Court denying the Petitioner's motion for Stay Pending Appeal and for Reconsideration is reported at 152 LRRM 2960 and is reprinted in App. 23a.

JURISDICTION

The judgment of the Court of Appeals was issued on December 31, 1996, and a timely Petition for Rehearing and Rehearing *En Banc* was denied on March 4, 1997. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this Petition include Article III of the United States Constitution, Sections 1331 and 1337(a) United States Code, and Section 3(d) of the Labor Management Relations Act. The texts of these constitutional and statutory provisions are reprinted beginning at App. 181a.

STATEMENT OF THE FACTS

Petitioner ("Beverly") is a nation-wide, long-term health care company operating nursing facilities, institutional pharmacies, acute long-term transitional hospitals, retirement living centers, and home health centers,

Commencing in 1986 the General Counsel of the National Labor Relations Board ("Labor Board") began to apply *case handling procedures* only to unfair labor practice charges filed against Beverly facilities anywhere in the United States (App. 176a, Para. 1). All such charges were transferred from the regional office having geographic jurisdiction over the named Beverly facility under the Labor Board's Regulations and consolidated in one Regional Office (Pittsburgh, Pennsylvania). The Pittsburgh Regional Office "stockpiled" all Beverly charges by steadfastly refusing resolutions typical to such cases, *i.e.*, settlement attempts, deferrals to arbitration, and even requests to withdraw charges voluntarily made by charging parties. The Regional Office then consolidated these accumulated charges into massive "consolidated" complaints against Beverly (App. 176a, Para. 1). Through these procedures the General Counsel sought to deliberately exaggerate the extent of Beverly's alleged unlawful activity. These massively consolidated complaints were an exaggerated effort to "justify" a remedial order applicable to all Beverly

facilities nation-wide regardless of whether the particular facility had even been named in any charge and regardless of whether under accepted Labor Board rules and procedures a sweeping order would be available.

The General Counsel's first attempt to apply extraordinary nation-wide orders against Beverly was adopted by the Labor Board but rejected by the United States Court of Appeals for the Second Circuit.[1] The Court of Appeals stated that minor, "[n]on-hallmark violations at 3% of a company's [nearly 1,000] facilities does [sic] not show an anti-union *animus* amounting to a proclivity to violate the Act," particularly where there was no overall corporate involvement in the alleged unfair labor practices. 17 F.3d at 586.

THE GENERAL COUNSEL'S AGREEMENT WITH BEVERLY

On March 22, 1995, General Counsel Frederick L. Feinstein executed an "Agreement" with Beverly's General Counsel, Robert W. Pommerville (App. 180a). The parties expressed the mutual intention to reach an understanding:

> to permit efficient and timely resolution or litigation of other (Beverly) cases now pending or which may hereafter arise. . .[and] to afford the persons and parties involved therein expeditious relief where possible. . . . (Para. 2, App. 177a).

The General Counsel agreed *in writing* "for the duration of the Agreement" to follow normal case (charge) handling procedures (App. 178a, Para. 5) and not to "stockpile" charges or transfer charges from the Regional Office having original

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[1] *Beverly California Corp.*, 310 NLRB 222 (1993), *enforcement denied*, in pertinent part *sub nom, Torrington Extend-A-Care Employee Assn. v. Beverly California Corp.*, 17 F.3d 580 (2d Cir. 1994).

jurisdiction over the particular Beverly facility named in the charge, or "consolidate" charges involving separate Beverly facilities (App. 177a, Para. 3), or treat Beverly, its regional subsidiaries, or separate facilities as a "single employer" without a specific single employer allegation (App. 178a, Para. 5), or "stockpile" or "consolidate" charges naming separate Beverly facilities to create a claim for extraordinary nation-wide orders (App. 178a-179a, Para. 7).[2]

The Agreement prescribes charge handling procedures, the non-merit allegations and legal arguments the parties agree to exclude from pleadings, and reserves the General Counsel's option to issue complaints against Beverly that do conform to these agreed upon pre-complaint case handling procedures in those instances where settlement efforts are unsuccessful (App. 178a, Para. 7).

THE AGREEMENT BREACHED

The First Order "Consolidating" Cases

On March 14, 1996, the General Counsel issued a "consolidated" administrative complaint against Beverly that directly and clearly violates the Agreement in virtually ever respect (App. 33a-56a). The wording of the complaint shows the General Counsel once again "stockpiled" charges in the Pittsburgh Regional Office although under the Agreement at least six of the 20 charges should have been filed in either the Baltimore or Philadelphia Regional Offices having geographic jurisdiction over the Beverly facility named in the charge (App.

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[2] In return, Beverly agreed to give up legal contentions that it had raised as defenses to the General Counsel's unprecedented case handling procedures in *Torrington, supra,* and in two other proceedings, pending decision by the Board (App. 178a, Para. 5; App. 179a, Para. 8).

34a-35a, Paras. 2(b), 3(a) & (b)) and complaint issuance determinations made by the Directors in those Offices. The "consolidated" complaints are based upon charges held far beyond "normal case handling" time targets (App. 43a, Paras. 1 and 2) (three months delay) (App. 33a-34a, Paras. 1(a),(c)) (over seven months delay). The administrative complaint names Beverly, it Regional Office, and 20 separate Beverly facilities not as separate facilities as required by the Agreement, but as a "wholly owned subsidiary" *i.e.*, a single employer (App. 35a-36a, Paras 2(a) and (b), 3(a) and (b)). The General Counsel also seeks remedial relief against *all* Beverly Pennsylvania facilities (union and non-union alike), instead of proceeding separately against only those 20 facilities named in specific charges and limiting any relief requested to the particular facility involved (App. 39a, Para. 20, *et seq.*). The "consolidated" cases were set for administrative hearing on May 14, 1996 (App. 40a, 46a, 56a). Thereafter, the General Counsel unilaterally suspended the hearing, but the "consolidated" complaints have *not* been withdrawn. Indeed, on May 2, 1997, (after the Court of Appeals' decision challenged here) the General Counsel reactivated these complaints by setting a hearing date of June 23, 1997.

The Second Order "Consolidating" Cases

On May 9, 1996, the General Counsel issued a Second Order Consolidating Cases and Consolidating Complaints against Beverly and set a hearing date of July 15, 1996 (App.

57a-175a).[3] This 118 page complaint further shows the General Counsel's breach of the Agreement. For example, the language of the complaints: alleges that Beverly and its separate facilities and regional offices are a "single employer" instead of naming only the separate facility as required by the Agreement (App. 64a); "consolidates" 20 separate Pennsylvania facilities in one case instead of treating each facility as a separate entity "on an individual basis" as required by the Agreement (App. 81a-83a, Paras. 2(a)(b)); and seeks extraordinary relief including private property access for union organizers, not just at the separate Pennsylvania facility where a violation may be found, as required by the Agreement and not just Pennsylvania union and non-union facilities, but *all* 600 plus Beverly facilities nation-wide (App. 172a-173a).

STATEMENT OF THE CASE

On March 29, 1996, Beverly filed its breach of contract Complaint (App. 26a-31a). The Complaint invokes federal subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1337(a) (App. 26a). The Complaint seeks specific performance in the form of an injunction, not against any prosecution, but merely to require the General Counsel to adhere to the Agreement by withdrawing the administrative complaints temporarily until the underlying charges are processed through

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[3] The General Counsel attempted to circumvent the Agreement by delaying issuance of this massive complaint until after he terminated the Agreement effective May 6, 1996 (App. 180a, Para. 11). However, all the charges that are the basis for the "consolidated" complaint were filed either on February 13, 1996, or April 4, 1996, and then "stockpiled" in the Pittsburgh Regional Office while the Agreement was in effect (App. 64a-81a, Paras. 1(a), (b), (e), (f), (i), (j), (m), (n), (q), (r), (u), (y), (z), (cc), (dd), (ee), (hh), (kk), (ll), (oo), (pp), (ss), (tt), (ww), (xx), (aaa), (bbb), (eee), (fff), (iii), (jjj), (mmm), (nnn), (qqq), (rrr), (uuu), (vvv), (yyy), (zzz), *et. seq.*).

the case handling procedures required by the Agreement (App. 30a-31a). Beverly also seeks compensatory damages, including fees and costs, and if appropriate, attorney's fees (App. 31a). No relief, temporary or otherwise, is requested from these or any other charges that are processed in conformity with the Agreement (App. 31a).

The District Court denied jurisdiction on the ground that Beverly "does not cite to any provision of the [National Labor Relations] Act prohibiting a complaint to issue. . ." (App. 20a), although the Complaint made no allegation claiming jurisdiction or relief based upon the NLRA. The Court described the Complaint as not one concerning case-handling procedures agreed to by the General Counsel, but "subject matter fully within the *Board's* expertise" (App. 21a, n.2) (emphasis added). And even though the Complaint seeks no relief from administrative complaints that do adhere to the Agreement's pre-complaint conditions, the District Court mistakenly considered the case as challenging the "issuance of a complaint" (App. 22a). Finally, the Court concluded that an "adequate statutory remedy is available" (App. 20a). According to the Court, "adequacy" means Beverly could endlessly litigate its beach of contract Complaint "before an Administrative Law Judge, the Board, and then before a Court of Appeals" (citations omitted) in the very same administrative proceeding alleged to violate the Agreement (App. 19a-20a). The District Court dismissed the Complaint without providing Beverly a requested hearing citing Fed.R.Civ.Pro. 12(b)(1) (App. 16a).

The District Court denied Motions for Stay Pending Appeal and for Reconsideration on July 10, 1996 (App. 23a-25a). Because of the imminence of the July 15, 1996, administrative hearing, Beverly filed a Notice of Appeal on July 3, 1996 (App. 15a). The Court of Appeals denied

Beverly's Emergency Motion for Stay on July 18, 1996 (App. 13a).

The Court of Appeals affirmed the District Court and also misconstrued Beverly's Complaint to be a challenge to "the propriety of the General Counsel's enforcement of the NLRA" (App. 10a), and then interpreted "jurisdictional limitations" in the NLRA to bar direct federal district court review of even a breach of contract suit (App. 8a, 9a). Nothing in the NLRA or its legislative history supports this judicial jurisdictional exemption. The Court of Appeals also considered the NLRA's post-complaint "administrative review scheme" to "effectively" redress Beverly's breach of contract claim although it recognized in another case that administrative exhaustion cannot provide a means of relief where the administrative proceeding itself is allegedly barred by an express contract executed by the same official initiating the administrative proceeding (App. 10a).[4]

REASONS FOR GRANTING THE PETITION

I. Impact Upon Regulated Parties

The Court of Appeal's nullification of contractual property rights through the denial of timely and effective judicial review is of fundamental importance to all parties contracting with the federal government over prosecution whether or not they are parties to this case. As this Court recently recognized in *United States v. Winstar Corp.*, ___ U.S. ___, 116, S.Ct. 2432, 2457 (1996): there are "an enormous variety of contracts" where performance affects a power regulatory or otherwise peculiar to the federal government that can be nullified by multi-tiered federal agency procedures in the modern administrative state. In this period of federal agency budget reduction, it is even

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[4] *Alabama Power Co. v. FERC*, 993 F.2d 1557 (D.C.Cir. 1993).

more likely that federal regulatory and enforcement agencies will expand the number of agreements, like the Agreement in this case, that conserve increasingly restricted personnel ceilings and operating budgets against the background of competing prosecutorial priorities. While there are no available statistical programs that compile the variety and number of these contracts with regulated parties, it cannot be denied that this Court is correct in presuming that the numbers and variety of these contracts are "enormous." Thus, the population of regulated parties who now have agreements with their regulating federal agencies or who will in the future believe they can rely upon these agreements to conserve their own limited financial and human resources is substantial. The writ should issue to insure that these contractual property rights are protected by the timely invocation of federal district jurisdiction as well as to rectify the particular injustice created by the courts below.

II. The Decision Below Conflicts with This Court's Authorities that Uphold the Sanctity of Contract

Last term, this Court upheld the enforceability of "good will" capitalization credits promises made by federal banking regulators in contracts with certain thrift institutions asserted through breach of contract actions. Among other things, the federal government claimed that as a result of post contract Congressional changes negating the use of good will accounting credits, the "good will" contracts interfered with ongoing and future federal government regulation of the thrifts. In *United States v. Winstar Corp., supra*, this Court rejected the Government's argument in an analysis that draws important and controlling parallels that support the contractual validity and timely enforceability of Beverly's breach of contract action.

This Court's analysis begins with the fundamental principle that the government's express "good will" promises to the thrift institutions, like all federal contractual promises, relied upon by promisees are valid "property" rights protected from nullification by the Fifth Amendment. 116 S.Ct. at 2466,n. 43. *See also Lynch v. United States*, 292 U.S. 571,579 (1934) ("Valid contracts [with the United States] are property...protected by the Fifth Amendment (citations omitted)."

This Court then considered the specific text of the "good will" contracts and found that the language of the executed "good will" agreements did not even purport to exempt the thrifts from ongoing federal government initiated regulation. 116 S.Ct. at 2458. Similarly, the thrifts breach of contract action sought no judicial relief against present or future federal regulation but only the "benefit of promises made by the Government. . ." *Id.* Therefore, the federal regulators who had closed two thrifts and denied credits to a third, were accountable in damages for abrogating their promises of allowing use of "good will" credits, because the remedies against the federal government are the same as those "applicable to contracts between private individuals". 116 S.Ct. at 2464-5. *Citing Lynch v. United States, supra*, 292 U. S. at 579. In sum, *Winstar* establishes breach of contract accountability for a class of government promises that implicate neither governmental regulation nor enforcement responsibilities, nor through judicial relief permanently intrude upon these federal prerogatives.

Beverly, as the thrifts in *Winstar*, seeks only to enforce its contract bargain. The words of the Agreement expressly preserve the government's enforcement initiatives in all future Beverly cases in any case not settled during the term of the Agreement (App. 178a). The Complaint also seeks judicial

relief "only (for) the benefit of promises made" by the General Counsel, that are available to private parties (specific performance of the promises made, or if impossible monetary damages)(App. 30a-31a).

The Court of Appeals erred fundamentally by misconstruing Beverly's valuable and enforceable property rights as having no independent significance apart from the General Counsel's prosecutorial authority. In fact, the Agreement here is directly analogous to government contracts that affect but do not foreclose regulatory treatment of the participants in the regulated industry, such as the contract this Court considered and upheld in enforcing valuable property rights in *Winstar*. The Court of Appeals decision denies Beverly this contract right and removes from timely breach of contract accountability a broad category of existing and future government contracts that conserve private party and federal resources through express promises of particular enforcement accommodations with regulated parties. The nullification of contractually created *property* rights where federal governmental regulatory or enforcement authority is unaffected denies Beverly and other contracting parties the very Fifth Amendment protection recently reaffirmed in *Winstar*.

III. The Decision Below Abrogates Beverly's Property Rights Under the Agreement to a Timely Remedy for the General Counsel's Breach

The General Counsel concedes the Agreement is valid. Nor can it be plausibly maintained that the Agreement merely is a statement of general policy, as the courts below would have it, somehow encompassed within the General Counsels' complaint issuance authority. The very wording of the Agreement shows that the parties entered into this Agreement in a mutual "desire to reach an understanding concerning the

resolution of [all pending and new cases]" (App. 177a, Para.3). The Agreement further evidences specific promises by the General Counsel to process charges in new cases as required by paragraphs 3,5, and 7. *Supra* pp. 3-4. This mutual intention creates a contractual *commitment* that is binding upon the General Counsel. *U.S. v. Winstar, supra,* at 2465, n.39; *Sinking Fund Cases*, 99 U.S. 700, 719 (1879)(federal government bound by contractual obligation to the same extent as private parties). This conclusion inevitably follows because it would have been irrational for Beverly to attempt to conserve its limited litigation resources and agree to forego legal arguments only upon an open ended, but precatory, unenforceable statement of policy that offers no protection from exactly the same massive complaints the General Counsel had been issuing since 1986. Restatement (Second) of Contracts § 202 (1)(1981) ("Words and other conduct are interpreted in light of all circumstances, and if the principal purpose of the parties is ascertainable it is given great weight").[5]

The Agreement is intended to create a valuable property right in the promises the General Counsel voluntarily executed. *Lynch v. United States, supra.* Beverly's property right is nullified unless the General Counsel can be held accountable in a neutral Article III court immediately upon his breach rather than at the conclusion of the very administrative procedure that violates the Agreement.

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[5] Indeed, the General Counsel acted under the compulsion of the Agreement by withdrawing a "consolidated" complaint in one instance and transferring the individual charges to the appropriate regional offices for separate facility-by-facility settlement, other resolution or litigation (App. 177a-178a, Para. 4).

Under the controlling precedents of this Court, all who contract with the federal government possess a property right that confers a collateral right to a "speedy," effective, and timely remedy "to materially lessen the injurious effects which would otherwise flow from the nonfulfillment of the contract." *Roehm v. Horst*, 178 U.S. 1, 19, 20 (1900); *Wicker v. Hoppock*, 6 Wall. (73 U.S.) 94, 99 (1867); *Hetzel v. Baltimore & Ohio R.R. Co.*, 169 U.S. 26, 38 (1898). *Accord*: Restatement of Contracts § 329 (1932); U.C.C. § 1-106(1) ("remedies...shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed. . . ."). *See also*, Simpson, *Contracts*, § 195 (2d Ed. West 1965) ("any breach of contract no matter how slight gives the injured party a right of action. . . .").

Unless Beverly can actually obtain a speedy judicial review, it suffers ever increasing injurious effects (and the General Counsel unjustly benefits from) the effective deprivation of the "benefit of Beverly's bargain" to be free during the Agreement's term from precisely the kind of "consolidated" administrative complaints and Draconian orders sought by the General Counsel here during the Agreement's term. As *Winstar* recognizes, the Fifth Amendment property right arising from a contract with the government is as effectively nullified by the denial of government accountability as by the denial of contract validity itself.

IV. The Decision Below Effectively Repeals an Express Congressional Grant of District Court Jurisdiction

The Court of Appeals creates an unjustifiable expansive notion of "the NLRA's jurisdictional limitations" (App. 8a) to deny Beverly a neutral federal judicial forum to hear this breach of contract Complaint. This judicial interpretation finds no textual support in any provision of the NLRA; nor is there

any language in the provisions of 28 U.S. §§ 1331 and 1337(a) that exempts the General Counsel from this grant of federal jurisdiction. Properly construed according to the ordinary and reasonable words used by Congress, the provisions of 28 U.S.C. §§ 1331 and 1337(a) are a plenary grant of federal district court subject matter jurisdiction over breach of federal contract suits where, as here, the federal contract exists and arises from federal law. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (suit for recovery of tariff payments created by Interstate Commerce Act).[6]

Federal trial courts exercise original jurisdiction over civil actions, including breach of contract suits, that arise under the "Laws of the United States." United States Constitution, Article III § 2. This Constitutional grant of federal question jurisdiction has been codified in Sections 28 U.S.C. §§ 1331 and 1337(a). A complaint is one "arising under federal law" within these jurisdictional provisions whenever the federal claim is a "direct element" of the controversy.

The Office of General Counsel, like other federal enforcement and regulatory agencies, exists exclusively as a creature of federal law – Section 3(d) of the National Labor Relations Act. The only basis for the General Counsel's authority to agree to apply certain case handling procedures in Beverly cases is a delegation from Congress in a statute "regulating commerce within 28 U.S.C. § 1337(a). *Avco Corp.*

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[6] *Accord: MCI Telecommunications Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1093-96 (3d Cir. 1995) *cert. denied*, ___ U.S. ___, 117 S.Ct. 64 (1996) (federal subject matter jurisdiction over private contract to recover payments for service under Federal Communications Act); *Florida East Coast Ry Co. v. Jacksonville Terminal Co.*, 328 F.2d 720, 722 (5th Cir.), *cert. denied*, 379 U.S. 830 (1964) (I.C.C. approval of private contract providing joint railroad terminal ownership confers 28 §§ 1331 and 1337(a) subject matter jurisdiction).

v. Aero Lodge 735, 390 U.S. 557, 561-2 (1968); *Capital Service, Inc. v. NLRB*, 347 U.S. 501, 504 (1954); *A.F. of L. v. Watson*, 327 U.S. 582, 591 (1946). The Agreement itself is wholly the product of federal law, and, therefore, *subject matter* jurisdiction over Beverly's breach of contract complaint lies in the federal trial court under the grant of authority in both 28 U.S.C. §§ 1331 and 1337(a) because the same "arising under federal law" test applies to both sections. *Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1, 8 n. 7 (1983).

Beverly's breach of contract claim is a substantial one. During the term of the Agreement, the General Counsel has so far issued and set hearing dates in two massive "consolidated" complaints against Beverly from the same Regional Office. *Supra*, pp. 4-6. The *wording* of certain paragraphs of these complaints shows that the General Counsel's processing of the individual and amended charges in these "consolidated" complaints *prima facie* violates each of the procedures the General Counsel agreed, in writing, to abide by in Beverly cases. *Id.*

The allegations of the Complaint must be accepted as true in reviewing jurisdictional motions granted under Rule 12(b)(1) Fed.R.Civ.Pro. Beverly's allegations more than meet the "arguably plausible claim" standard. Therefore, Beverly's Complaint was properly before the District Court by virtue of the jurisdictional standards expressed in 28 U.S.C. §§ 1331 and 1337(a) and the pleading standards set forth by this Court in *Conley v. Gibson*, 355 U.S. 41, 45-6 (1954) (moving party must show no set of facts support plaintiff's claim).

The specific case handling procedures identified in the Agreement are binding upon the General Counsel not because they are on their face mandatory provisions, but because the General Counsel *agreed* to make them applicable to Beverly cases. The General Counsel, like any other federal official, is

accountable in federal district court, for his contractually created obligations. It is the breach of this bargain that confers subject matter jurisdiction upon the federal district court. Federal courts are vested with a "virtually unflagging obligation" to exercise the jurisdiction given them. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-18 (1976). The opinion below repeals this constitutional grant of direct jurisdictional accountability, not only in this case, but in all cases where federal officials unilaterally rescind contractual rights relied upon by private parties in any industry subject to federal regulation.

V. The Decision Below Requiring Exhaustion of the NLRA's Protracted Administrative Procedures is Contrary to this Court's Authorities

In *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), this Court reaffirmed its precedents holding that where the rationale for administrative exhaustion is absent, direct judicial review of federal agency action is consistent with the oversight responsibilities residing in the federal judiciary. Where, as here, the breach of contract claim is "wholly collateral" to the judicial review provision of the NLRA, and is quite "outside the agency's expertise," and "particularly" where all meaningful judicial review would be foreclosed, the claim is outside the administrative regulatory structure. 510 U.S. at 212-13. In this case, the General Counsel has inflicted an injury on Beverly for which the law affords a breach of contract remedy apart from the judicial review provisions of the NLRA.

The evidentiary record necessary to determine the merits of this case is now complete, nothing more need be or could be added during an administrative hearing that will enhance judicial review at the end of the NLRA's two tiered administrative proceeding. The sole legal question presented

– the contractual rights and obligations of the parties to the Agreement – is entirely outside the Labor Board's unfair labor practice jurisdiction, and the Labor Board's field of "expertise." This Court has repeatedly denied assertions of exhaustion under the NLRA, as well as other regulatory statutes, where the subject matter of the lawsuit is within the "conventional experience of judges." *International Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233, 238-9 (1971) ("fairness of an internal union disciplinary proceeding" within "conventional experience of judges" not "within the special competence of the NLRB"); *Kaiser Steel Corp. v. Mullins*, 445 U.S. 72, 83-6 (1982) (federal courts, not NLRB, have duty to determine whether a contract violates NLRA); *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 305-6 (1976) (fraudulent misrepresentation claim "within the conventional competence of courts, and the judgment of a technically expert [federal agency] body is not likely to be helpful in the application of these standards to the facts of this case.").

The NLRA's "enforcement scheme" applies exclusively to judicial "review" of Labor Board decisions within delegated adjudicatory power to regulate the practices of collective bargaining. *Leedom v. Kyne*, 358 U.S. 184, 188-189 (1958) (federal district court jurisdiction provides a remedy where lawsuits do not seek "review" within Sections 10(e) and (f) of NLRA). It does not apply to breach of contract suits. The Labor Board has no jurisdiction or "expertise" over alleged breaches of collective bargaining agreements, even when those agreements may violate the substantive provisions of the NLRA. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957) (federal district courts have subject matter jurisdiction to fashion substantive law in suits alleging resolution of collective bargaining agreements); *NLRB v. Strong Roofing & Insulating Co.*, 393 U.S. 357, 360-61 (1959) (Labor Board has no plenary

authority to administer and enforce collective bargaining agreements"); *Kaiser Steel Corp. v. Mullins, Id.*

The Labor Board has no jurisdiction to compel parties engaged in collective bargaining to agree to any contract terms, (*H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970)), and has no delegated authority to provide monetary damages or even to construe or enforce promises agreed to by the General Counsel with Beverly or any other contracting party. *McCarthy v. Madigan*, 503 U.S. 140, 156-158 (1992) (concurring opinion).

Beverly's breach of contract action is not a "disguised challenge" to the merits of the General Counsel's unfair labor practice complaints. Beverly seeks no injunction against prosecution unlike Thunder Basis Coal Co. *See* 510 U.S. at 205. Nor is the Complaint a "piecemeal attack" on the agency's administrative process. Here, Beverly's claim is that the General Counsel's refusal to keep his express promise to apply certain case handling procedures that antedate complaint issuance creates an "infirmity [that] is fundamental" to the validity of the entire administrative proceeding. *Assn. of National Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1156 (D.C.Cir. 1979), *cert. denied*, 447 U.S. 921 (1980) (allegation of pre-judgment bias by federal agency officials is a fundamental infirmity to commencement of rule making proceeding); *Amos Treat Co. v. SEC*, 306 F.2d 260, 265 (D.C.Cir. 1962) (*id.* initiation of investigation).[7]

The Court of Appeals for the District of Columbia Circuit earlier recognized and applied these settled principles where "inviolate" contract rights are nullified. In *Alabama Power Co. v. F.E.R.C.*, 993 F.2d 1557 (D.C.Cir. 1993), the Federal Energy

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[7] Prejudgment bias against Beverly is not a remote possibility. *See* 310 NLRB 222 (1993). *In re Murchison*, 349 U.S. 133, 136 (1955).

Regulatory Commission agreed in writing with certain power companies to investigate the propriety of the return-on-equity component of formula rates in three year cycles beginning in 1984, instead of yearly or at the Commission's discretion. The Commission initiated an annual investigation in a year barred by the contract.

The *Alabama Power Co.* Court suggested that litigation expenses incurred directly from an agency's violation of a contractual promise would constitute irreparable injury and properly held that the infringement by the Commission "upon a valuable, bargained-for-right" was directly reviewable *prior* to final agency action because "the contractual right to be unfettered by investigation must remain inviolate." 993 F.2d at 1567. The Court further distinguished cases, such as *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1 (1974), because in none "was the agency's initiation of administrative proceedings purportedly prohibited by express contractual agreement between the agency and the party against whom the proceedings were brought." 993 F.2d at 1567.[8] Finally, the Court below agreed that the companies' lost contractual right cannot be cured" by a final agency order that the formula rates are not excessive, and that direct judicial review of the "purely legal question of contract interpretation" did not tread upon F.E.R.C. administrative "territory." *Id.*

Beverly's contractual right to be unfettered from massive administrative complaints is also an "inviolate" contract right. Remedial relief from the burden upon Beverly personnel and

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[8] For the same reason, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) is inapplicable here. *NLRB v. Food & Commercial Workers*, 484 U.S. 112 (1987) is also inapposite. The General Counsel's discretion is controlled by his own Agreement with Beverly, not his statutory discretion to settle non-Beverly cases.

the ever increasing costs of defending the two "massive complaints" is irreparable injury. Meaningful relief can only come *before* the administrative hearings, not after. This prejudicial effect is exacerbated by the NLRA's time-consuming multistage "administrative review scheme" and is another persuasive policy reason upheld by this Court for direct judicial review here. *See Coit Indep. Venture v. FSLIC*, 489 U.S. 561, 588-590 (1989) (mere risk of agency delay justifies prompt state court jurisdiction over claims against insolvent banks); *Gibson v. Berryhill*, 411 U.S. 564, 575, n. 14 (1973) (delay renders administrative proceeding inadequate).

Application of exhaustion here is an unwarranted and irrational expansion of the doctrine beyond its historical and practical warrant. The opinion below converts a neutral primary jurisdiction doctrine into a preemptive strike that nullifies contractual property rights by suffocating those rights in an endless administrative process. Here, this allows the General Counsel to act as if the Agreement is a legal nullity offering only illusory and unenforceable promises.

VI. The Decision Below Draws a Baseless Jurisdictional Distinction Between Federal Agency Actions in Violation of Statutory Mandates and Actions in Violation of Contract

In *Leedom v. Kyne, supra*, this Court ruled that federal agency actions or inactions in violation of mandatory statutory rights owed regulated parties subject to the federal agencies' jurisdiction are directly reviewable in federal district court. This Court rejected the Labor Board's argument that because the National Labor Relations Act was silent as to this grant of jurisdiction, that statute could be read to preclude it. 358 U.S. at 187. Vindication and protection of these statutory rights

were entrusted to the federal judiciary, not to federal agency forbearance.

As this Court has recently guaranteed in *Winstar*, the protection of contractual property rights whenever violated by federal government action is no less important to the contracting parties and to the "Government's own long-run interest as a reliable contracting partner. . . ." 116 S.Ct. at 2459. This Court has long recognized that the general interest of society depends upon a rule of law that upholds and enforces contractual obligations. *Sturgis v. Crowninshield*, 4 Wheat. 122, 197 (1819) (Marshall, C.J.: "obligation of contract [is] the law which binds the parties to perform their agreement"); Corbin, *Contracts*, 1 Vol. Ed., Ch. 1, p. 5 (West 1952) ("[a] contract is a promise or set of promises for the breach of which the law gives a remedy. . . .").

The Court of Appeals offered neither rationale nor precedent for its conclusion that contractual property rights are less entitled to judicial enforcement than statutory rights. In both cases the federal district courts have jurisdiction to ensure that federal agencies abide not only by Congressionally enacted mandates, but also by promises made by federal officials in admittedly valid contracts. The Court of Appeals denial of jurisdiction to federal courts to enforce contractual rights undermines the obligation of contract and deserves review by this Court.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of *certiorari* to the Court of Appeals for the District of Columbia Circuit.

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